PP

v.

PASUPATHY KANAGASABY

COURT OF APPEAL, KUALA LUMPUR
LAMIN MOHD YUNUS PCA
MOKHTAR SIDIN JCA
MOHD SAARI YUSOFF JCA
[CRIMINAL APPEAL NO: B-09-23-1995]
9 MARCH 2001

CRIMINAL PROCEDURE: *Appeal - Procedures for, principles governing - Appeal by Public Prosecutor - Questions of law - Whether necessary for prosecution to formulate questions of law - Courts of Judicature Act 1964, s. 50(2), (3)*

CRIMINAL PROCEDURE: *Trial - Close of prosecution's case - Standard of proof applicable - Beyond a reasonable doubt - Application of 'prima facie' standard by magistrate - Whether a fatal misdirection*

CRIMINAL PROCEDURE: *Trial - Misdirection of law - Close of defence's case - Magistrate stating that prosecution deemed to have proved case beyond a reasonable doubt because defence failed to raise a reasonable doubt on prosecution's case*

EVIDENCE: *Identification parade - Conduct of identification parade - Whether proper - Comparison between accused and other participants - Height and age of other participants*

The respondent was charged in the Magistrate's Court for an offence under s. 414 of the Penal Code. He was convicted and sentenced to 26 months' imprisonment and a fine of RM10,000. On appeal the High Court set aside the conviction and sentence on the basis that the evidence of one of the prosecution's witnesses ('the accomplice') was not corroborated. Hence this appeal by the prosecution.

The prosecution submitted that the learned judge should have considered the evidence of the prosecution as a whole and then determine whether the evidence of the accomplice had been sufficiently corroborated.

Counsel for the respondent then raised the preliminary objection as to whether the appeal by the Public Prosecutor was properly before the court. He argued that the prosecution when filing the petition of appeal had not formulated any questions of law as required by s. 50(2) of the Courts of Judicature Act 1964.

The respondent also raised pertinent issues for consideration namely: (i) whether the magistrate had applied the correct test at the close of the prosecution's case and also at the close of the defence; and (ii) whether the identification parade was properly conducted.

Held:

Per Lamin Mohd Yunus PCA & Mokhtar Sidin JCA

[1] Section 50(3) of the Courts of Judicature Act 1964 expressly states that the Public Prosecutor is not required to apply for leave when appealing. All he needs to do is to file a notice of appeal. This means there is nothing to submit before the court and therefore it must necessarily mean that the Public Prosecutor is not required to show to the court that there are questions of law which have arisen in the course of the appeal. When it is said that the Public Prosecutor's appeal is not confined to questions of law because he is not required to apply for leave, it means that the Public Prosecutor has the liberty to re-examine every aspect of the case.

[2] The case was heard and decided by the magistrate before the amendment to s. 173(f) of the Criminal Procedure Code, and since the amendment had no retrospective effect, the standard of proof promulgated in *Arulpragasan Sandaraju v. PP* applied – that is the beyond a reasonable doubt test and not the *'prima facie'* test. The magistrate had however applied the *'prima facie'* test and therefore had committed an error which was not capable of being cured.

[3] The magistrate had also committed an error at the end of the defence's case when she stated that the failure of the defence to raise a reasonable doubt resulted in the prosecution having proved its case beyond a reasonable doubt. The correct test to apply at the close of the defence was whether the evidence adduced by the defence raised a reasonable doubt in her mind as to the guilt of the accused in respect of the offence with which he was charged. If the defence succeeded in raising a reasonable doubt then the accused was entitled to an acquittal.

[4] At the time the identification parade was conducted, the accused was 43 years old. The identification parade comprised seven participants, the youngest being 24 years old and the oldest 51 years old. Only three participants were almost of the same age as the respondent. Furthermore, when compared to the participants the respondent was the tallest. Only two of the participants were almost of the same height as the respondent. The identification parade therefore was not properly conducted.

[Appeal dismissed.]

*[**Bahasa Malaysia** Translation Of Headnotes]*

Responden telah dituduh dalam Mahkamah Majistret untuk kesalahan di bawah s. 414 Kanun Keseksaan. Responden telah disabitkan dan dijatuhkan hukuman penjara selama 26 bulan dan denda sebanyak RM10,000. Beliau telah merayu kepada Mahkamah Tinggi yang telah mengenepikan pensabitan dan hukuman itu atas sebab bahawa keterangan salah seorang saksi pendakwaan ('rakan sejenayah') tidak disokong. Oleh itu menyebabkan rayuan ini oleh pihak pendakwaan.

Pihak pendakwaan berhujah bahawa hakim yang bijaksana sepatutnya telah mempertimbangkan keterangan pendakwaan secara keseluruhannya dan kemudiannya menentukan samada keterangan rakan sejenayah itu disokong dengan secukupnya.

Peguam responden sebaliknya telah membangkitkan bantahan awal samada rayuan oleh Pendakwa Raya telah dikemukakan di hadapan mahkamah dengan teratur. Beliau berhujah bahawa pihak pendakwaan ketika memfailkan petisyen rayuan telah tidak merumuskan sebarang soalan undang-undang sepertimana yang dikehendaki oleh s. 50(2) Akta Mahkamah Kehakiman 1964. Responden juga membangkitkan isu-isu yang berkaitan untuk dipertimbangkan: iaitu (a) samada majistret telah memakai ujian yang betul pada penutupan kes pihak pendakwaan dan juga pada penutupan pembelaan; dan (b) samada perbarisan cam telah dikendalikan menurut aturan.

Diputuskan:
Oleh Lamin Mohd Yunus PMR & Mokhtar Sidin HMR

[1] Seksyen 50(3) Akta Mahkamah Kehakiman 1964 dengan jelasnya manyatakan bahawa Pendakwa Raya tidak diperlukan untuk memohon kebenaran ketika merayu. Apa yang perlu beliau lakukan ialah memfailkan satu notis rayuan. Ini bermakna bahawa tiada apa untuk dihujahkan di hadapan mahkamah dan oleh itu ia semestinya bermakna bahawa Pendakwa Raya tidak diperlukan untuk menunjukkan kepada mahkamah bahawa terdapatnya soalan-soalan undang-undang yang telah berbangkit dalam perjalanan rayuan tersebut. Apabila diperkatakan bahawa rayuan Pendakwa Raya tidak terlingkung kepada soalan undang-undang kerana beliau tidak diperlukan supaya memohon kebenaran, ianya bermakna bahawa Pendakwa Raya mempunyai kebebasan untuk memeriksa semula setiap aspek kes tersebut.

[2] Kes tersebut telah didengar dan diputuskan oleh majistret sebelum pindaan kepada s. 173(f) Kanun Prosedur Jenayah dan oleh kerana pindaan tersebut tidak mempunyai kesan kebelakangan, standard bukti dalam *Arulpragasan Sandaraju v. PP* dipakai – iaitu diluar keraguan

yang wajar dan bukannya ujian *"prima facie"*. Majistret tersebut walaubagaimanapun telah memakai ujian *"prima facie"* dan oleh itu telah melakukan kesilapan yang tidak boleh dipulihkan.

[3] Majistret tersebut telah juga melakukan kesilapan di penghujung kes pembelaan apabila beliau menyatakan bahawa kegagalan pembelaan untuk membangkitkan sebarang keraguan yang wajar menyebabkan pihak pendakwaan membuktikan kes tersebut di luar keraguan yang wajar. Ujian yang betul untuk dipakai pada penutupan pembelaan adalah samada keterangan yang dikemukakan oleh pihak pembelaan telah membangkit keraguan yang wajar dalam pemikiran beliau berhubung dengan kesalahan tertuduh berhubung dengan kesalahan bagi yang mana beliau telah dituduh. Jika pihak pembelaan berjaya membangkitkan sebarang keraguan yang wajar maka tertuduh berhak mendapat pembebasan.

[4] Ketika pembarisan cam dijalankan, tertuduh berumur 43 tahun. Pembarisan cam tersebut terdiri daripada tujuh orang peserta, yang termuda berumur 24 tahun dan yang paling tua berumur 51 tahun. Hanya tiga peserta berada dalam lingkungan umur yang hampir sama seperti responden. Lagipun, apabila dibandingkan dengan peserta-peserta tersebut, responden adalah yang paling tinggi. Hanya dua peserta mempunyai ketinggian yang hampir sama dengan responden. Pembarisan cam tersebut dengan itu telah tidak dikendalikan dengan sempurna.

[Rayuan ditolak.]

Case(s) referred to:
Arulpragasan Sandaraju v. PP [1996] 4 CLJ 597 ***(foll)***
Chan Sin v. PP [1949] MLJ 106 ***(refd)***
Harun Abdullah v. PP [1998] 3 CLJ 184 ***(refd)***
Saad Abas & Anor v. PP [1998] 4 CLJ 575 ***(refd)***
Surandran Rajaretnam v. PP [1998] 2 CLJ 207 ***(refd)***
Teo Peen Soon & Ors v. Reg [1956] MLJ 241 ***(refd)***

Legislation referred to:
Courts of Judicature Act 1964, ss. 3, 50(2), (3)
Criminal Procedure Code, s. 173(f)

Other source(s) referred to:
Black's Law Dictionary, 7th edn

For the appellant/prosecution - Muniandy Kannyappan DPP
For the respondent - Shahul Hameed Amirudin; M/s Zul Rafique & Partners

[Appeal from High Court, Shah Alam; Criminal Appeal No: 41-185 & 198-1989]

Reported by Mariette Peters-Goh

JUDGMENT

Lamin Mohd Yunus PCA:

The hearing of this appeal commenced on the morning of 9 October 2000 and submissions were continued in the afternoon and the following day when it was postponed to a date to be fixed for decision. When we sat on 23 November 2000 and before we could deliver our judgment, which was ready, Encik Shahul Hameed Amirudin, learned counsel for the respondent asked the court that he be allowed to make a further submission on the interpretation of sub-ss. (2) and (3) of s. 50 of the Courts of Judicature Act 1964 (CJA 1964) that took the form of an objection as to the manner the appeal was lodged and argued by the learned Deputy Public Prosecutor. The learned Deputy Public Prosecutor Encik Muniandy Kannyapan informed the court that Encik Shahul intimated to him of his proposed objection only that morning. However he was prepared to make a submission in reply if the court decided to hear the objection.

Encik Shahul's main complaint was that there was not a single question of law formulated by the prosecution when filing the petition of appeal as envisaged by sub-s. (2) of s. 50 of the CJA 1964 and the appeal must therefore be dismissed. For ease of reference we reproduce below sub-ss. (2) & (3) of the CJA 1964:

> (2) An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, against any decision of the High Court in the exercise of its appellate or revisionary jurisdiction in respect of any criminal matter decided by a Magistrates' Court but such appeal shall be confined to only questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision.
>
> (3) Notice of any appeal by the Public Prosecutor shall be given by, or with the consent in writing of, that officer only; and notwithstanding subsection (2) no leave of the Court of Appeal is required.

In support of his contention that the question of law must be formulated he referred to the judgment of this court in the case of *Saad Abas & Anor v. PP* [1998] 4 CLJ 575 where we said (at p. 587):

> Now one final and vital point to be shown in an application made under s. 50(2) is one without which the application may be dismissed. It is this. The affidavit in support must formulate the "question of law" which have arisen in the course of the appeal "and the determination of which by the High Court has affected the event of the appeal." Not one such "question of law" was formulated. If we had so minded we could have summarily dismissed the application on this ground.

In that case, Saad Abas & another were jointly tried before a magistrate for a criminal offence and they were acquitted and discharged at the end of the prosecution case. On appeal by the learned Public Prosecutor, the High Court allowed it in the terms that they were to enter their defence. They were not satisfied with the said order and they then filed an application for leave to appeal against it under s. 50(2) of the CJA 1964. The application for leave to appeal was dismissed. The court had to decide whether in the circumstances of this case the word "decision" found in sub-s. (2) fell within the meaning of the word "decision" as defined in s. 3 of the CJA 1964. Further the court found that not one question of law was formulated in the affidavit in support. It was a straightforward case in the sense that the court had only to deal with the application of sub-s. (2). Subsection (2), in my view, was drafted especially for the benefit of an aggrieved accused person. As for the Public Prosecutor, he may avail himself of the provision of sub-s. (3). Subsection (2) stands on its own while sub-s. (3) has to be read with sub-s. (2) because of the phrase "notwithstanding sub-s. (2)" found in sub-s. (3). When an accused person desires to appeal, the full force of sub-s. (2) comes into play. He has to apply for "leave" and that his appeal must be "confined to **only questions of law** which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision."

To obtain "leave" in order to enable him to file the notice of appeal he has to satisfy the court that there are questions of law of the type as specified in sub-s. (2) and he must formulate those questions for ease of recognition and determination by the court. If we may repeat, he must first obtain the "leave" before he can file the notice of appeal.

As for the Public Prosecutor, it is clear that he is not required to apply for "leave" (sub-s. (3)). But is he in the same position as the accused in that he has to show in the same manner that there exist questions of law. The second limb of sub-s. (3) reads:

> ; and notwithstanding subsection (2) no leave of the Court of Appeal is required.

Black's Law Dictionary (7th edn) defines the word "notwithstanding" as "despite, in spite of." It is a common word. We do not need to research further for its meaning. To put it succinctly what that phrase means is that notwithstanding whatever is provided in the whole of sub-s. (2), the Public Prosecutor is not required to apply for leave if he wishes to appeal. He merely files the notice of appeal. The fact that he is not required to apply for leave to appeal means that he is free to appeal against the order of acquittal and sentence. An accused person having been sentenced by a magistrate may appeal

to the High Court on the question of sentence only but he cannot appeal further to the Court of Appeal because there will be no "question of law etc ... " to support his application for leave.

Now, sub-s. (2) states "An appeal shall lie to the Court of Appeal, with the leave of the Court of Appeal, ... but **such** appeal shall be confined to only questions of law." (emphasis added). With the words "such appeal" it must refer to the appeal "with the leave" or requiring leave. So sub-s. (2) is aimed to make provision for an appeal requiring leave. When "leave" is required to be applied for, it connotes that the applicant has to satisfy the court certain condition; meaning that there must be a subject matter for arguments. In sub-s. (2), the applicant must show whether or not there exist questions of law. So the existence or otherwise of the questions of law is the subject matter for submission before the court. The applicant, as we have said earlier, is no other than the aggrieved accused person. On the other hand the Public Prosecutor needs only to file a notice of appeal and for that purpose it is expressly provided "no leave" is required. That means there is nothing to submit before the court. With respect, we are of the view therefore that the Public Prosecutor is not required to show to the court that there are "questions of law which have arisen in the course of the appeal or revision and the determination of which by the High Court has affected the event of the appeal or revision."

One may ask as to what is the rationale for requiring the aggrieved accused to show the existence of "questions of law ..." while it is not so required on the part of the Public Prosecutor. When it is said that the Public Prosecutor's appeal is not confined to questions of law because he is not required to apply for leave, it means that the Public Prosecutor has the liberty to re-examine every aspect of the case. Before the Public Prosecutor decides to bring an accused person to court with a charge that he has committed a criminal offence, he must be satisfied that he has sufficient evidence against the accused to answer. Therefore when, especially the accused is acquitted at the end of the case for the prosecution, immediately it comes to mind that there must be something wrong in the case. Therefore it is only reasonable to grant the Public Prosecutor, being the guardian of public and State's interests, the privilege to re-examine the whole case so far presented to the court before a higher tribunal ie, by way of an appeal.

On the other hand, cases that go on appeal under sub-s. (2) are those where a conviction has been recorded and they are not involving serious criminal offences being those coming only from a Magistrate's Court and in most cases there will only be a finding of fact. So it is not unreasonable or unjust to confine the accused's appeal to only questions of law.

So in conclusion, with regard to the case before us, the approach adopted was proper and correct in that no question of law having been formulated for argument.

Mokhtar Sidin JCA:

We have dismissed the appeal on 5 February 2001 and now we give our reasons for doing so.

The respondent was charged in the Magistrate's Court at Petaling Jaya as follows:

Principal Charge

That you on the 8th day of February 1988, at the United Malayan Banking Corporation, Sungai Way, Subang Branch, in the District of Petaling Jaya, in the State of Selangor Darul Ehsan, voluntarily assisted in the disposal of property to wit Employees Provident Fund Warrant No. 526702 amounting to $246,151.96 which you had reason to believe to be stolen property and that you have thereby committed an offence punishable under Section 414 of the Penal Code.

Alternative Charge

That you on the 8th day of February 1988 at the United Malayan Banking Corporation, Sungai Way, Subang Branch, in the District of Petaling Jaya, in the State of Selangor Darul Ehsan, voluntarily assisted in making away with property to wit a sum of $246,151.96 in respect of Employees Provident Fund Warrant No. 526702 which you had reason to believe to be stolen property and that you have thereby committed an offence punishable under Section 414 of the Penal Code.

The learned magistrate convicted the respondent on the alternative charge and sentenced him to 26 months imprisonment and also a fine of RM10,000 or in default eight months imprisonment. Being dissatisfied with the said decision, the respondent then appealed to the High Court. The learned judge of the High Court allowed the appeal and set aside the conviction and the sentence. The learned public prosecutor being dissatisfied with the decision of the learned judge now appeals to this court.

During the submission of the learned counsel for the respondent, he raised a preliminary point as to whether the appeal by the learned public prosecutor was properly put before this court in view of s. 50(2) and (3) of the Courts of Judicature Act 1964. It was submitted by the learned counsel that s. 50(2) is applicable to both the prosecution and the accused when the case originated from the Magistrate's Court. The learned President of the Court of Appeal had delivered the judgment of this court in respect of this issue on 12 January 2001. A copy of the judgment is attached herewith.

On the appeal proper it is clear to us at the High Court both sides argued the appeal fully including the defence. In his judgment the learned judge allowed the appeal by the respondent solely on the ground that PW21 was an accomplice and that it is an accepted principle of law that the evidence of an accomplice unless corroborated should not be relied upon to convict an accused. In his judgment his Lordship stated:

> In the opinion of this Court, if there are any independent confirmation tending to connect the Appellant with the offence and thus corroborating the evidence of PW21 is the brief case. In the brief case were various discriminating evidence which included documents and paraphernalia related to the purpose of defaulting EPF. Also included therein was a horoscope book which has a name, address, telephone number and date of birth written thereon similar to the Appellant, except that the last 2 digits of the telephone number were incorrectly placed. Of the documents found (besides the horoscope book) the learned Magistrate singled out P4(B)(1). This document with handwritings was duly examined by PW2, the handwriting expert attached to the Chemistry Department of Malaysia. PW2 found that the handwritings therein were similar to those specimen writings provided by the Appellant. Based on this, and that of the horoscope book the learned Magistrate was of the opinion that the brief case belonged to the Appellant. This is indeed a fundamental error.
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> To begin with, P4(B)(1) was not a document found in the brief case. It was a document taken from the EPF file. If this document was not from the brief case, there can be basis to infer that the brief case belonged to the Appellant. PW2 may have found the handwriting on this document similar to that of the Appellant, but the issue here is not whether this document was forged by the Appellant; it is whether the brief case belonged to the Appellant, and one of the vital factors is that P4(B)(1) must be found in the brief case in order for the Magistrate to return a positive answer. Absence of P4(B)(1) in the brief case demolished the Magistrate's finding on this point.
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> This Court shall now proceed to examine the horoscope book which the learned Magistrate found to belong to the Appellant. This book has a name similar to that of the Appellant together with an address and slightly incorrect telephone number of the Appellant's residence in Kuala Lumpur. Further it was contended that the date of birth which the horoscope was charted matches that of the Appellant. For this reason, the prosecution alleged that this brief case must have belonged to the Appellant. To place such heavy reliance on this fact to imply not just this book belonged to the Appellant but also because it was in the brief case, the same must have also belonged to him is certainly against the principle of proving beyond reasonable doubt. This is particularly so when there exist other equally important circumstantial evidence to imply others having ownership of this brief case.

Firstly, there are evidence adduced by the prosecution themselves that the writings (ie,) the particulars on the horoscope book was not that of the Appellant. It was admitted that an Indian astrologer prepared this book including the insertion of these particulars on information given by a man. This man, however was never been identified.

Secondly, the brief case which was locked was not opened by the Appellant. Instead, it was opened by PW21, the accomplice himself who obviously knew the correct combination numbers to the lock. This prior knowledge of the correct combination number is not unsimilar to a person owing a key to the lock thus also implying ownership of the brief case itself.

Thirdly, in the brief case besides the horoscope book was an identity card. This card has a photograph of a person known as Jeeva. The police authorities had knowledge of his whereabouts but he was never called to testify. Similarly, by implication like that of the horoscope book, this brief case could have also belonged to Jeeva.

Based on these circumstances, this Court finds that the learned Magistrate has erred in giving undue weight on the existence of the horoscope book with particulars to arrive at her decision that the brief case must have belonged to the Appellant.

Without the ownership of the brief case being proved to belong to the Appellant, there are no independent confirmation tending to connect the Appellant with the offence which could corroborate the evidence of PW21. PW21's evidence should therefore be discarded by the learned Magistrate. Such being the case, the 6 reasons given based on the uncorroborated testimony of PW21 are invalid.

The learned judge then allowed the appeal and set aside the conviction and the sentence imposed by the magistrate. Being dissatisfied with that decision the public prosecutor appealed. The only ground of appeal by the public prosecutor was that the learned judge had erred when he concluded that there was no corroboration of the evidence of the accomplice (PW21) in respect of the briefcase. It was submitted by the learned deputy public prosecutor that the learned judge should have considered the evidence of the prosecution as a whole and then determine whether the evidence of PW21 had been sufficiently corroborated. After hearing the submissions of both sides we had intimated to the parties that we agreed with the learned deputy public prosecutor that the learned judge had erred on this point there were sufficient evidence of corroboration of PW21's testimony. On this intimation the learned counsel then asked for leave to address us on other points which were not raised in the grounds of appeal. It was submitted by the learned counsel that the points to be raised raised by him were raised by the learned judge, but those points we not touched by the learned judge in his judgment. Those points

were important because they had bearings on the defence. The learned deputy public prosecutor left it to the court whether to allow the respondent to address this court on those points. In the interest of justice we then allowed the learned counsel to address us on those points. We also gave the parties time to prepare their submissions.

After hearing the submissions of the learned counsel for the respondent, we found that the respondent had two important and pertinent issues which merit our consideration:

1. Did the learned magistrate apply the right test at the close of the prosecution and also at the close of the defence?

2. The identification parade was not properly held.

1. Did The Learned Magistrate Apply The Right Test At The Close Of The Prosecution And Also At The Close Of The Defence?

It is common ground that this case was heard and decided by the learned magistrate before the amendment to s. 173(f) of the Criminal Procedure Code (CPC) and that the amendment had no retrospective effect. In view of that the standard of proof as stated in *Arulpragasan a/l Sandaraju v. Public Prosecutor* [1996] 4 CLJ 597 applied. In that case the Federal Court by a majority decision held:

> The prosecution had to prove every ingredient of a charge and at the end of the case for the prosecution, the court should then evaluate all the admissible evidence as adduced relevant to the charge and decide whether to call an accused to enter his defence. Under s. 180 of the Code, the prosecution was obliged to make out against an accused a case which if unrebutted would warrant his conviction before the accused could be called upon to enter on his defence. Since in order to convict the accused, if the case for the prosecution was not rebutted, the court must be satisfied of the guilt of the accused beyond all reasonable doubt, the court before calling the accused to enter upon his defence must be satisfied that the prosecution had made out a case against the accused beyond all reasonable doubt. Therefore the standard of proof required from the prosecution at the close of its case, in a non-jury trial in Malaysia was, having regard to the statutory formula in s. 180 of the Code, the usual criminal standard of proof, to wit, the beyond all reasonable doubt standard of proof, which called for a maximum evaluation of the evidence tendered by the prosecution. 'A more rigorous test of credibility' was to be applied to the prosecution's evidence, instead of the much lower *Haw Tua Tau* standard of proof of a mere *prima facie* case which called for a minimal evaluation of the evidence tendered by the prosecution ...

That case made it clear that the test to apply at the close of the prosecution was the "beyond reasonable doubt" test and not the "*prima facie*" test. It is only with the introduction of the amendment of s. 173(f) of the CPC the *prima facie* test applies at the close of the prosecution. This amendment had no retrospective effect. As we have stated earlier the correct test to be applied by the learned magistrate at the close of the prosecution in this appeal was the "beyond reasonable doubt" test. In her judgment the learned magistrate said:

> After having heard the evidence given by the prosecution witnesses and the submissions of both learned DPP and learned Defence Counsel the Court is satisfied that **the prosecution has proven a *prima facie* case against the accused and therefore defence is called.** (emphasis made).

With this it is clear to us the magistrate had applied the wrong test at the close of the prosecution. It is obvious to us that the learned magistrate had erred when she applied the wrong test to call for the defence.

The learned counsel for the respondent submitted that the learned magistrate had committed a grave and fatal error when she called for the defence on the basis of *prima facie* test. It was further submitted that this error was not capable of being cured and he cited *Harun bin Abdullah v. PP* [1998] 3 CLJ 184 and *Surandran a/l Rajaretnam v. PP* [1998] 2 CLJ 207. In *Harun bin Abdullah*, Abdul Malek Ahmad, JCA (as he then was) delivering the judgment of the court at p. 200 stated:

> The amendment has no retrospective effect as decided by the Federal Court in *Bahruni bin Ismail v. PP* and *Dalip Bhagwan Singh v. PP* [1998] 1 MLJ 1. The amendment came about because of the divided views of the Federal Court in *Arulpragasan a/l Sandaraju v. PP* where the majority view is to prove a case beyond reasonable doubt. The standard of proof in the instant appeal, therefore, would be proof beyond reasonable doubt and not the *prima facie* test.
>
> On these considerations, in applying the subsection to the situation in this appeal, as has been agreed to by both learned counsel and the learned deputy public prosecutor, the latter as regards the proviso in particular, we must find that the learned sessions court judge had misdirected herself when she applied the *prima facie* test. With us applying the more stringent reasonable doubt test to the facts of this case on the evidence available, we could only conclude that the result would certainly not be the same as we hold that no case had been made out against the appellant beyond reasonable doubt. Consequently, the defence of the appellant should not have been called.

> We must reiterate that since this was a breach of an explicit provision of the CPC and a principle of general importance in the administration of justice, it was not an error, omission or irregularity for which a finding, sentence or order could be reversed or altered under s. 422 of the CPC. This is irrespective of whether such error, omission or irregularity has occasioned a failure of justice. In effect, the said section cannot be applied for cases where the wrong standard of proof has been applied.
>
> This is certainly an illegality and not a mere error, omission or irregularity. ...

Shaik Daud, JCA in *Surandran a/l Rajaretnam v. PP* [1998] 2 CLJ 207 at p. 210 stated:

> The learned deputy public prosecutor while conceding that the learned sessions judge did not apply the beyond reasonable doubt standard, further contended that, whatever be the standard of proof applied, whether *prima facie* or beyond reasonable doubt standard, the sessions judge would have arrived at the same decision.
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> With respect, we are unable to agree with this submission. The issue in this appeal is not as contended by the learned deputy public prosecutor. The issue is whether the learned sessions judge applied the right and proper standard of proof at the close of the case for the prosecution.
>
> The issue of whether the prosecution at the close of its case is required to prove a *prima facie* case or to prove a beyond a reasonable doubt case has been of great controversy for a number of years. At stated in *Bahruni bin Ismail v. PP* [1997] 2 MLJ 265, 'without embarking into the history on this issue all over again' it has now finally come to rest with the decision in *Arulpragasan a/l Sandaraju v. PP* [1997] 1 MLJ 1 where at p. 12 of the report it was held that the standard of proof at the close of the case for the prosecution is beyond reasonable doubt. Therefore, in the light of this decision, to all intents and purposes, the standard of proof to be applied in all cases whether before or after *Arulpragasan*'s decision, must necessarily be beyond reasonable doubt. ...
>
> Therefore, in the instant appeal, we were unanimously in agreement with the submission of Mr. Karpal Singh that the learned sessions judge erred in law when he applied the *prima facie* standard of proof at the close of the case for the prosecution. We held that there was clear misdirection by the trial judge. We also held that a misdirection of this nature, which goes to the very root of the matter, is incapable of being cured by the provision of s. 422 of the Criminal Procedure Code, as the misdirection involves a principle of general importance in the administration of justice.

Against those authorities, the learned deputy public prosecutor contended the error was curable. He went on to say that this court after perusing the evidence of the prosecution as a whole there are overwhelming evidence to show that

the prosecution at the close of the prosecution had proved the guilt of the accused beyond reasonable doubt; the defence should be called even though the learned magistrate had named the wrong test of *prima facie*. No authorities were cited to us and it was not pointed out to us the evidence relied upon to show that the prosecution had proved the case beyond reasonable doubt. Whatever it is, it is clear to us from the authorities the error committed by the learned magistrate is incapable of being cured.

In the present appeal, the learned magistrate had not only committed an error at the close of the prosecution, she had also committed another error at the close of the defence when she stated in her judgment as follows:

> According to section 173(f) CPC requires the accused to rebut the prosecution's case ie, to raise a reasonable doubt and if he fails to discharge that onus, the prosecution is deemed to have proved its case beyond a reasonable doubt and the accused could be convicted of the charge.

First of all the learned magistrate was in error when she stated that the failure of the defence to raise any reasonable doubt then it was deemed that the prosecution had proved its case beyond reasonable doubt. It is clear to us this test was never laid in any law or authority. The correct test to apply at the close of the defence by the magistrate was whether the evidence adduced by the defence raised any reasonable doubt in her mind as to the guilt of the accused person in respect of the offence for which he was charged. If the defence succeeded in raising any reasonable doubt then the accused person is entitled to an acquittal. If the defence failed to do then the accused is to be convicted. Question of deeming does not arise at all.

It is obvious to us that the learned magistrate had erred when she applied the wrong test at the close of the prosecution case and also at the close of the defence.

2. The Identification Parade Was Not Properly Held

Another important issue raised by the respondent was the identification parade held by the police where PW14 identified the respondent. The issue raised by the learned counsel for the respondent was in respect of the conduct of the parade itself in that the parade was not properly conducted. Two points were raised by the learned counsel for the respondent in respect of this.

The first point was in respect of the participants who took part on the identification parade. From the record it is clear that at the time when the parade was conducted the accused was 43 years of age. From the evidence there were seven participants on the parade, the youngest being 24 years and the oldest was 51 years of age. Of those seven only three participants were

almost of the same age group as the respondent. Those three were 38, 39 and 45 years of age. In addition, it was established and not disputed that compared to the participants, the respondent was the tallest. Only two of the participants though shorter were almost of the same height as the respondent.

The second point raised was that the respondent was not allowed to shave. According to the respondent he had requested that he would be allowed to shave before the parade was held.

In respect of the identification parade we would like to refer to the judgment of Willan, CJ in *Chan Sin v. Public Prosecutor* [1949] MLJ 106 at p. 108:

> We would further point out that in this country it has always been the practice in Police Identification Parades that all the persons on the Parade should be of the same nationality as that of the suspected person, as far as possible they should be from the same station in life as that of the suspected person; and also there should be no great disparity of ages in the persons on the Parade.

In *Teo Peen Soon & Ors. v. Reg.* [1956] MLJ 241, Whyatt, CJ at p. 243 said:

> Now with regard to the third appellant, the prosecution's case is a little stronger because the evidence given at the trial shows that the complainant did identify him at an identification parade. At the hearing of this appeal however, when the third appellant was asked what he wanted to say to the Court, he stated that when he was picked out at an identification parade, the other persons on the parade were school boys with two exceptions; those two exceptions were tall persons like himself. He then went on to say that those two tall persons were taken away from the parade before the complainant was actually asked if she could make her identification and he summed up his version of that identification parade by saying he thought it was unfair. If his account of it is truthful and accurate, it certainly was unfair. ...

From the evidence which we have stated earlier, most of the participants were of different age and height from the respondent and according to the authorities the identification parade held was certainly unfair to the respondent. The learned deputy public prosecutor in his reply conceded the disparity but submitted that the respondent did not raise any objection when the parade was held. With the greatest respect to the learned deputy public prosecutor, we are of the view that it was not for the respondent to object but rather the duty of the officer conducting the parade to ensure that the parade was properly and fairly held. To ensure that the parade is properly and fairly held it is the duty of the officer conducting the parade to look for participants who are of similar age, stature and appearance as the accused person.

For the reasons we have stated, we find that the evidentiary value of the identification parade is worthless and the learned magistrate should not have considered the evidence of identification of the respondent by PW14 at the parade.

Conclusion

For the reasons abovestated we are of the view that the learned magistrate had committed fatal errors and flaws in arriving at her findings. For those reasons her decision could not be upheld. Thus, for different reasons, we agree with the learned judge that the conviction of the respondent should be set aside and the sentence imposed quashed. The appeal by the public prosecutor is hereby dismissed and the order of the learned judge of the High Court is hereby affirmed.